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Attorney General Discusses Intelligence Capabilities

Editor's Note: On December 18, 1981, Attorney General William French Smith spoke before the Los Angeles World Affairs Council. His speech dealt with the depleted state of our intelligence capabilities at the point where the Reagan administration took over and with the measures that have been taken since that time to restore these capabilities. Written from the standpoint of the nation's number one lawyer, the speech contained a lot of valuable history in addition to a concise but remarkably comprehensive review of the various measures initiated by the administration. We are reprinting the following excerpts because we feel that the attorney general's speech is one that most of our readers would not want to miss.

Forty years ago on December 7 our nation awoke to experience the reality of inadequate intelligence. Even as the Pacific war's beginning testified to the inadequacy of this nation's intelligence capabilities, a much-improved American and allied intelligence system speeded its successful ending.

The importance of intelligence gathering to this country is, however, as old as the country. George Washington, who personally supervised such operations during the Revolutionary War, in 1777 noted "the necessity of procuring good intelligence" and the "secrecy" upon which the effort depends. From that day to the present, effective and secret intelligence-gathering has enhanced the security of the United States. In the nuclear age it has become essential to our preservation.

At the same time, secrecy cannot be unrestrained in a democracy. Ours is a nation of laws because we recognize the dangers when even well-intentioned officials exercise power in secret. Even as the preservation of our national security requires effective intelli-

gence gathering, the preservation of our national principles requires accountability and obedience to law in the exercise of governmental authority—especially when secrecy is necessary.

Prior to 1975, intelligence matters only occasionally received public exposure. U. S. intelligence remained an iceberg with nine-tenths of its substance below the surface.

During the 1970s, however, a number of improper activities by our intelligence agencies were disclosed in the Congress and the press. . . .

An emotionally charged, public reaction naturally followed. Administration and congressional bodies

Continued on page 2

Upcoming Law Professor Programs

The Standing Committee on Law and National Security will cosponsor the next law professor workshop at the University of Mississippi, Oxford, Mississippi, on May 20-22. The program will deal with the law and national security ramifications of new space technology, including the space shuttle.

As an adjunct to the law professor workshop program, the committee is cosponsoring a special colloquium at the University of Georgia, Athens, Georgia, on May 7-8. Entitled "Internal Conflicts: Dilemmas in International Law," it will honor Dean Rusk for his contributions to the development, study and practice of international law.

Appropriate invitations will be issued by the hosting institutions. Law professors and others interested in attending should contact: Professor Stephen Gorove, University of Mississippi Law Center, University, Mississippi 38677 (Tel. 601-232-7361); Professor Gabriel M. Wilner, University of Georgia School of Law, Athens, Georgia 30602 (Tel. 404-542-7140).

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Intelligence Capabilities

Continued from page 1

concluded, however, both that a secret intelligence capability was in fact necessary to the preservation of our democratic society and that the major portion of our intelligence agencies' activities were within legal limits. Nevertheless, there were excesses that could not be condoned.

In response, President Ford developed an executive order to remedy the perceived difficulties caused by an absence of clear authorities, lines of responsibilities, and operational guidelines. Issued in February 1976, Executive Order 11905 contained a brief description of the National Security Council decision-making structure, the functions of each of the intelligence agencies, and a statement of limitations on the use of various types of intelligence collection techniques either in the U. S. or against Americans abroad. In addition, it required the attorney general to develop guidelines. That order also established the Intelligence Oversight Board to investigate charges of illegality or impropriety.

In January 1978, President Carter replaced Executive Order 11905 with Executive Order 12036. The new order added an additional level of detail to the structure created by President Ford. It required that the attorney general develop or approve procedures governing virtually every aspect of intelligence gathering in the U. S. or affecting U. S. citizens abroad. As a result, over 30 discrete sets of procedures and guidelines required approval by the attorney general—and scores of interagency directives and regulations were created.

Congress also responded in this period of national soul-searching—at first, by setting up permanent House and Senate Select Committees on Intelligence to oversee the activities and budgets of our intelligence agencies. In 1978 it enacted the Foreign Intelligence Surveillance Act, which established new administrative and legal requirements for electronic surveillance.

When the Reagan administration took office in January 1981, there had been six full years of revelation, condemnation, and an ever-increasing body of new regulations for United States intelligence agencies. That the men and women of our intelligence community continued throughout to function ably in that atmosphere of suspicion and mistrust is a testament to their dedication and professionalism. There were, moreover, serious costs to the effectiveness of our intelligence effort during this period:

- First, intelligence agencies and their employees became cautious and reluctant to undertake perfectly legitimate activities.
- Second, cooperation among agencies was

discouraged by rigid rules about the jurisdiction and powers of particular agencies, and by prohibitions on the flow of information among agencies.

- Third, massive leaks and the exposure of legitimate intelligence matters compromised many secrets and called into question our ability to protect classified information from unauthorized disclosure.

In summary, President Reagan inherited an intelligence community that had been demoralized and debilitated by six years of public disclosures, denunciation, and—in addition—budgetary limitations.

Unfortunately, during this same period, our need for a reliable foreign intelligence capability was dramatically increasing. Communist takeovers in Indochina—as well as the loss of pro-Western governments in Central Asia, the Middle East, and the Horn of Africa—posed new dangers. By the time the Russians invaded Afghanistan and the Iranians took our diplomats hostage, the Carter administration itself had begun to appreciate the need for more effective foreign intelligence.

The threat to our government and its citizens from hostile intelligence services and international terrorist groups was also increasing dramatically. By statute and executive order, the FBI has primary responsibility for countering the clandestine intelligence activities of foreign powers and international terrorist activities within the United States. Since the FBI is under the jurisdiction of the Department of Justice, I have become acutely aware of the hostile intelligence and international terrorist threat we face in the United States.

This threat, and particularly the activities of the KGB, have at long last received some media attention in recent months. I welcome this attention because it is important for the American public to realize that hostile intelligence agents increasingly operate in the United States under a number of guises:

- First, as diplomats. About one-third of the Soviet bloc personnel in the United States assigned to embassies, consulates, and the U.N. or other international organizations are believed to be full-time intelligence officers. And over the last dozen years the number of official representatives of governments with hostile intelligence activities in our country has increased by 400 percent.
- Second, as trading company representatives. There are dozens of corporations in the United States that are largely or exclusively owned by the Soviet bloc countries. Earlier this week in Los Angeles, a Polish trading

Continued on page 5

First Amendment Seminar

The Standing Committee on Law and National Security (together with the Center for Law and National Security, University of Virginia School of Law, and the International Law Section, American Bar Association) cosponsored a seminar on "The First Amendment and National Security" at St. Thomas, Virgin Islands, on January 8-10. Approximately 60 were in attendance, including a member of Congress, law professors, present and former government officials, private law practitioners concerned with First Amendment rights and/or intelligence matters, and other concerned Americans.

At the opening dinner on January 8, John Shenefield, formerly United States associate attorney general, discussed his views of the pluses and minuses in the handling of intelligence matters by the Reagan administration in its first year.

On January 9, John C. Jeffries Jr., professor of law, University of Virginia School of Law, presented a legal history of the various forms of prior restraint on publication. His talk evoked continuing comments throughout the remainder of the seminar.

A panel, which included Richard K. Willard, Office of Intelligence Policy, Department of Justice, and Daniel B. Silver, former general counsel, Central Intelligence Agency, considered the manifold problems in a democracy of censorship based on national security considerations. (Just the problem of defining what is national security illustrated the difficulty of the subject.)

The next panel, which included Professor Norman Dorsen, president, American Civil Liberties Union, and Antonin Scalia, professor of law, University of Chicago Law School, discussed the problems inherent in providing access to information about the government and national security. The basic issues of "how freely" and "to whom" government-held information should be given were discussed by all four panelists and the audience.

The last panel on January 9, which included Floyd Abrams, media legal adviser, and Ernest Mayerfeld, deputy general counsel, Central Intelligence Agency, discussed whether and to what extent legislation prohibiting the publication of covert agents' identities constituted sanctions imposed on speech.

On January 10, a panel, which included civil rights advocate Leonard B. Boudin, for many years general counsel to the National Emergency Civil Liberties Committee, Professor of Law Paul B. Stephan III, University of Virginia School of Law, and John S. Warner, former general counsel, Central Intelligence Agency, considered the legal problems of preventing foreign travel of individuals in national security cases (e.g., *Haig v. Agee*).

The concluding panel, which included Professor of Law Thomas I. Emerson, Yale Law School, and Frank McNamara, former executive secretary of The Subversive Activities Control Board, considered the legalities of intelligence gathering about domestic political activities, and the benefits and dangers thereof.

All of the panels included a question and answer period and, as may be imagined from the heterogeneity of the panelists and participants, a vigorous but controlled chain reaction of discussion took place.

The entire seminar was thought provoking, stimulating and educational. It was enjoyed by all, regardless of their point of view, and will aid in the benefit of public discussion of the serious constitutional questions facing our nation in the field of First Amendment rights and national security needs.

Lawrence H. Williams

The Novorossisk Incident

By Your Editor

In the last issue of *Intelligence Report* a promise was made to follow the "Whiskey on the Rocks" story with another which involves international and national security law. It happened in the North Atlantic in 1959 and involved the cutting (accidental or deliberate?) of one or two major cables over which flowed a large percentage of transatlantic telephone calls.

The principal actors in the case were AT&T Long Lines; Gen. Curtis LeMay, then commander of the Strategic Air Command; Adm. Arleigh Burke, then Chief of Naval Operations; Neil McElroy, then Secretary of Defense; President Eisenhower and your editor, then Deputy Judge Advocate General of the Navy. All living actors have been consulted as well as the files in the case.

It all started when, on a bleak February day in 1959, your editor was summoned to Adm. Burke's office. He carefully closed the door and informed me that Gen. LeMay had put a B-52 squadron on alert because of five breaks in four days of major transatlantic communications links. (He was the general who made the famous remark, "Without communications all I command is my desk.") He now says, remembering the incident, that he was concerned because SAC didn't have good side-band communications in those days, there were no satellites then, and cable communications were very important.

Gen. LeMay had requested the Navy to dispatch a ship to *board* the Novorossisk, which had already been identified by an AT&T Long Lines plane as the probable culprit. Adm. Burke, no slouch at taking immediate action in an emergency, had already dis-

Continued on page 4

The Novorossisk Incident

Continued from page 3

patched the USS Hale with orders to put a boarding party on the Novorossisk. Your editor's job? Find a legal reason for boarding a Soviet vessel on the high seas — never before done in peacetime.

Lawyers sometimes have to act under great time pressures. In this case, with the Hale proceeding at flank speed through pancake ice to intercept on direct orders from CNO, time was of the essence. As the research started in the JAG library in Washington, on board the Hale the designated boarding officer, Lt. Sheely, was selecting a crew for the captain's gig and at the same time brushing up on approved procedures for boarding parties. Fortunately, there was on board a copy of *International Law for Seagoing Officers* by Burt Brittin. But, unfortunately, no one who spoke Russian. There was, however, a young Canadian sailor from Pawtucket, Rhode Island, who spoke French. He was to become the spokesman for the party, since the first mate of the Novorossisk also spoke French.

Happily, the JAG library yielded up an 1884 treaty on the Protection of Submarine Cables signed by Prince Orloff of Imperial Russia and acceded to by the USSR. Article II of that treaty provides:

The breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication, shall be a punishable offense, but the punishment inflicted shall be no bar to a civil action for damages..

There was, indeed, total interruption of communication through the severed cable, and AT&T Long Lines, Gen. LeMay and Adm. Burke wanted to find out how and why.

Legal justification for boarding in hand, your editor returned triumphantly to Adm. Burke. After explaining the treaty, he added the cautious caveat that in his opinion the secretary of defense should be notified before any boarding took place.

Adm. Burke made it plain in his particularly colorful and sometimes unprintable language that he would have preferred to act as John Paul Jones or Steven Decatur would have before modern communications made such clearances with civilian authorities necessary. However, recognizing the possible repercussions, he dispatched your editor with orders to explain the situation to Secretary of Defense Neil McElroy, whom, at the time, your editor served as speech writer.

A wonderfully gentle and compassionate man, Secretary McElroy exploded with unusual violence and exclaimed: "But I can't give my approval to this until it's been cleared with *State* and the president." With

that he sent for his car and took off for the White House, after calling and asking for an urgent appointment with President Eisenhower. Meanwhile, the Hale was speeding through the North Atlantic and getting closer and closer to the rendezvous.

Somewhat to your editor's surprise, the president, with State's concurrence, approved the boarding, and the news was passed to Adm. Burke at almost the moment the Hale signaled the Novorossisk to "heave to, we're putting a boarding party aboard."

Off through the pancake ice sped the Hale's gig, *International Law for Seagoing Officers* on the thwart. Of course, when the boarding party came aboard, the Soviets expressed ignorance, innocence and bewilderment. "Cut a cable? (Est-ce que nous avons coupé un câble?) Not us. We're just poor fishermen."

The boarding party meanwhile made an inspection and concluded there was evidence of cutting, which coupled with the earlier evidence from the Long Lines plane that the Novorossisk was the only trawler to be found in the area at the time of the incident, seemed damning enough to make a sharp protest to the Soviets. Furthermore, there had been other cuttings over a period of time, some of which looked as though they'd been done with an axe when the cables got in the way of the fishing drag and draglines (like those nasty Swedish rocks interfered with the peace-loving Soviet submarine).

The Soviets, of course, rejected the protest and refused to pay damages (their courts were the only ones under Article 8 of the treaty which could assess damages). They expressed outrage that such a boarding had taken place and, indeed, accused the United States of "international piracy."

At least, in the boarding of the Novorossisk international law was scrupulously observed. Argentina observed no such niceties when Soviet fishing vessels invaded its 200 mile exclusive fishing zone as congressional testimony before the U.S. Senate Committee on Commerce recounts:

The Soviet fleet, although officially advised of the new decrees, delayed in leaving the Argentine-claimed waters. Finally, in June 1968, two large Soviet stern factory trawlers were ordered by an Argentine naval vessel to stop for boarding and seizure, but did not heed Argentine orders. They were shot at; after one was hit amidships, both surrendered and were escorted into an Argentine port. Following weeks of negotiations, the two trawlers were released, but the Soviet fleet had to leave the Patagonian Shelf. Their catch there, which in 1967 amounted to 677,000 metric tons, was reduced to negligible proportions the following year.

Perhaps a small country far away can punch a super power in the nose and get away with it.

The result of the whole Novorossisk incident was a substantial lessening of cable cutting in the North Atlantic for some time. This is just another instance that holding violations of treaties up to international light brings about better observance or, at least, more cautious violation. Let us hope Whiskey-class subs stay out of territorial waters for awhile.

Intelligence Capabilities

Continued from page 2

company official who had been purchasing classified documents from an employee of one major defense contractor, was sentenced to life in prison.

- Third, as students, scientists, and reporters. Soviet bloc exchanges with the United States have increased dramatically over the past decade. And their ranks have been packed with full-time or part-time intelligence operatives.
- Fourth, as immigrants and refugees. Although virtually non-existent prior to 1973, Soviet immigration here has since then amounted to some 150,000. More recently, there has been a vast influx of Cuban refugees—who last year alone exceeded 100,000. We believe that a small but significant fraction of these recent refugees have been agents of Soviet and Cuban intelligence.
- Finally, we know that hostile intelligence services continue to infiltrate agents under assumed identities. In 1980 the FBI disclosed that Colonel Rudolph Hermann of the KGB had entered this country through Canada with his wife and son a dozen years earlier and had thereafter posed as a free-lance photographer living in a suburb of New York City.

The likely number of foreign spies in our country in those guises has increased sharply over the last decade. Unfortunately, our resources have not increased. At one time the FBI could match suspected hostile intelligence agents in the United States on a one-to-one basis. Now, the number of hostile agents has grown so much that our FBI counterintelligence agents are greatly outnumbered.

In addition to increasing their number of agents, hostile intelligence services have placed a high priority on scientific and technical information, much of which is unclassified proprietary data. The "Silicon Valley" near San Francisco and Southern California

defense contractors, for example, have been the targets of intensive foreign intelligence efforts.

Foreign intelligence agents—often posing as businessmen, diplomats, or newsmen—befriend employees in the United States, request innocuous information on various pretexts with nominal reimbursement, and finally attempt to obtain sensitive information in return for substantial cash payments. In a case last year, a Belgian businessman was charged with offering up to \$500,000 to American employees to steal computer software technology he was seeking for the Soviets.

United States businessmen traveling in the Soviet bloc are lured into compromising situations and then blackmailed into providing information and services.

High-technology products that cannot legally be exported to the Soviet bloc are frequently sent to "front" corporations in Western Europe and then transshipped to the ultimate destination. One man, for example, was convicted here in California last year for violating the Export Administration Act by shipping 50 high-energy laser mirrors to the Soviet Union by way of consignees in West Germany and Switzerland. Earlier this month in Los Angeles, a federal court sentenced two individuals to prison for illegally exporting state-of-the-art computers and other technological equipment to West Germany for diversion to Soviet bloc countries.

The costs to national security are incalculable because we depend upon our superior technology as a defense against Soviet military advantages in manpower and sheer volume of weaponry. A television documentary on the KGB shown by the Canadian Broadcasting Company a few months ago, for example, concluded that the theft of inertial guidance technology by Soviet intelligence improved the accuracy of Soviet ICBM's and made U.S. fixed, land-based missiles vulnerable—and argued that the theft created the need to build a costly MX missile basing system. The multi-billion dollar cost of the proposed MX missile basing system may thus illustrate the effectiveness of Soviet intelligence.

Perhaps even more insidious is the threat posed by hostile "active measures" in this country, which are aimed at influencing public opinion and the political process through "disinformation" and "agents of influence." Most serious of all, however, is the threat of international terrorism. Although we have been fortunate as a country to have been spared the degree of terrorism experienced by many of our Western European allies, we cannot permit our relative good luck to engender complacency. A small number of well-trained fanatics could change our fortunes overnight. As all of you know from press reports, the threat is real today. Libya's capability of sponsoring an effort

Continued on back page

Intelligence Capabilities

Continued from page 5

to assassinate high U. S. government officials provides a sobering example. As members of an open society that is the target of aggressive foreign powers, we must all recognize the grave threat from hostile intelligence and the need for more effective U. S. intelligence and counterintelligence. But we must do more than merely recognize such paramount concerns.

The Reagan administration is firmly committed to revitalizing the United States intelligence effort. That commitment is apparent in the president's recent promulgation of three new executive orders:

- Executive Order 12331 reestablished the president's Foreign Intelligence Advisory Board;
- Executive Order 12333, signed two weeks ago, clarifies the authorities, responsibilities, and limitations concerning U. S. intelligence; and
- Executive Order 12334 continues the President's Intelligence Oversight Board.

Revised procedures and guidelines will implement the new executive orders. This administration is also making available increased resources to the intelligence community and supports rebuilding personnel levels.

On behalf of the administration, the Justice Department has proposed amendments to the Freedom of Information Act to improve our ability to protect intelligence sources and methods. In addition, we support exemption of CIA and other key intelligence agencies from the requirements of that Act.

The administration also supports new legislation that would impose criminal penalties on those who make a practice of ferreting out and exposing the classified identities of our intelligence agents—frequently risking lives as well as our security interests.

Finally, the Justice Department is committed to vigorous enforcement of national security legislation, including laws prohibiting unlawful export of advanced technology and munitions.

Throughout, however, our goal has been to improve the effectiveness of U. S. intelligence agencies without endangering the rights of Americans. Intelligence activities must be conducted in a lawful manner. We will maintain five basic safeguards to ensure that they are: first, strict observance of fourth amendment and statutory requirements governing searches and electronic surveillance; second, a thorough appreciation for the legal distinctions between foreign intelligence and domestic security matters; third, appropriate limitations on the authority of the CIA to function within the United States; fourth, cooperation with congressional oversight through the House and Senate intelligence committees; and fifth, effective oversight within the Executive branch itself by the President's Intelligence Oversight Board and by the attorney general as chief law enforcement officer of the United States. . . .

Too frequently in a democracy, the pendulum of public policy swings in an excessively wide arc. Some 50 years ago Secretary of State Stimson observed: "Gentlemen do not read each other's mail." As we have learned since then, however, the real world is not peopled exclusively by gentlemen. The survival of this nation depends upon effective intelligence and counterintelligence measures. I—like all Americans—would prefer a gentler world. All Americans also prefer—and demand—that effective intelligence gathering observes due regard for the principles and norms that set this nation apart. . . .

I believe that the actions I have discussed today and those we undertake in the future will keep the balance true.

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